STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 15, 2009
v	No. 285638 Macomb Circuit Court
JONATHON CHARLES BAILEY, Defendant-Appellee.	LC No. 2007-001901-FC

Before: Saad, C.J., and O'Connell and Zahra, JJ.

PER CURIAM.

Defendant was charged with one count of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(b)(*ii*) (sexual penetration of a relative at least 13 years of age but less than 16 years of age), and two counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(b)(*ii*) (sexual contact with a relative at least 13 years of age but less than 16 years of age). Following a jury trial, defendant was convicted of one count of CSC II and was sentenced to 30 months to 15 years' imprisonment. He appeals as of right. We affirm defendant's conviction and sentence, but remand for correction of the judgment of sentence.

I. Expert Testimony

First, defendant argues that the trial court abused its discretion when it qualified Robert Schumann as an expert witness on the subject of delayed disclosure of sexual abuse and permitted Schumann to testify that delayed disclosure is a typical behavior by sexually abused children. We disagree.

We review for an abuse of discretion a trial court's decisions regarding the qualification of a witness as an expert and the admissibility of his testimony. *People v Dobek*, 274 Mich App 58, 93; 732 NW2d 546 (2007). An abuse of discretion exists if the court's decision results in an outcome outside the range of reasonable and principled outcomes. *People v Yost*, 278 Mich App 341, 353; 749 NW2d 753 (2008). Any preliminary issues of law regarding admissibility based on the construction of a rule of evidence or statute is subject to review de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). A trial court's findings of fact are reviewed for clear error. MCR 2.613(C).

In *Dobek*, *supra* at 93-94 (footnote omitted), this Court set forth the law applicable to an analysis of expert testimony:

The analysis regarding whether to admit or exclude expert testimony begins with MRE 702. We again quote MRE 702:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The trial court has an obligation under MRE 702 "to ensure that any expert testimony admitted at trial is reliable." *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 780; 685 NW2d 391 (2004). While the exercise of the gatekeeper function is within a court's discretion, the court may neither abandon this obligation nor perform the function inadequately. *Id.* Expert testimony may be excluded when it is based on assumptions that do not comport with the established facts or when it is derived from unreliable and untrustworthy scientific data. *Tobin v Providence Hosp*, 244 Mich App 626, 650-651; 624 NW2d 548 (2001); *Badalamenti v William Beaumont Hosp-Troy*, 237 Mich App 278, 286; 602 NW2d 854 (1999). The *Gilbert* Court stated that "junk science" must be excluded, and it further indicated:

> MRE 702 mandates a searching inquiry, not just of the data underlying expert testimony, but also of the manner in which the expert interprets and extrapolates from those data. Thus, it is insufficient for the proponent of expert opinion merely to show that the opinion rests on data viewed as legitimate in the context of a particular area of expertise (such as medicine). The proponent must also show that any opinion based on those data expresses conclusions reached through reliable principles and methodology. [*Gilbert*, *supra* at 782.]

Defendant challenges the admission of Schumann's testimony on three bases. First, he argues that the testimony was not relevant because delayed disclosure is a subject within the jury's common knowledge and, thus, expert testimony is not required. The trial court determined that the victim's delay in disclosure might be viewed by the jury as inconsistent with the behavior of a sexually abused victim. Our courts have recognized that in cases involving sexually abused children, it might be natural for a jury to question why a victim did not immediately disclose sexual abuse. See *People v Peterson*, 450 Mich 349, 373-374, 379-380; 537 NW2d 857 (1995), amended 450 Mich 1212 (1995); *People v Beckley*, 434 Mich 691, 715-718; 456 NW2d 391 (1990). Schumann's testimony was offered to explain why a child victim of sexual abuse might delay disclosing the abuse. Therefore, the trial court did not clearly err in finding that Schumann's testimony would be helpful to assist the jury in understanding the evidence.

Second, defendant argues that Schumann was not qualified under MRE 702 because he was not an expert on delayed disclosure. Defendant's focus on delayed disclosure as a distinct,

independent field of expertise is misplaced. Schumann's testimony was offered to explain that delayed disclosure is a behavior typical of sexually abused children. To be an expert and give such testimony, one should have an appropriate educational background in fields such as psychology and counseling, which cover human behavior and firsthand experience working with victims of sexual abuse. *Beckley*, *supra* at 712-713. Schumann had significant knowledge, experience, and education regarding the behaviors of sexually abused children. He had a master's degree in counseling and 70 hours toward his PhD, he continuously attended seminars that pertained to counseling and child sexual abuse, he was a licensed professional counselor, and he had over 30 years' experience in dealing with sexually abused children. He had also been qualified as an expert in court numerous times in the field of counseling.

Defendant asserts that Schumann's experience could not substitute for scientific training in the field of psychology and mentions that Schumann had not done any research or published any articles on delayed disclosure. However, MRE 702 expressly allows an expert to be qualified based on knowledge and experience. The extent of Schumann's experience with child sexual abuse victims affected only the weight of his testimony, not its admissibility. See *In re Noecker*, 472 Mich 1, 12; 691 NW2d 440 (2005). Similarly, Schumann's lack of published material did not disqualify him as an expert, nor did the fact that he was not a degreed professional. See *id*. at 11-12; *Beckley*, *supra* at 712-713. Thus, the trial court did not abuse its discretion in qualifying Schumann as an expert in matters involving sexually abused children, specifically concerning whether delayed disclosure is a behavior consistent with such a victim.

Third, defendant argues that Schumann's conclusions were not based on reliable data. In *Beckley*, *supra* at 718-721, the Court held that the *Davis/Frye*[1] test regarding reliability is not applicable where syndrome evidence is offered to explain behavior, i.e., the test is not applicable to the behavioral sciences. In *Gilbert*, *supra* at 781, our Supreme Court acknowledged that MRE 702 governed the trial court's role as gatekeeper and that the amended version of MRE 702 explicitly incorporated the *Daubert*[2] standards of reliability. The *Gilbert* Court further noted, however, that the trial court's gatekeeper role is the same under *Davis/Frye* and *Daubert*. *Id.* at 782. Thus, it is appropriate to consider the reasoning behind the *Beckley* Court's holding when considering whether an expert's testimony regarding behavioral traits of child sexual abuse victims satisfies the third prong of MRE 702. The *Beckley* Court stated:

> The ultimate testimony received on syndrome evidence is really only an opinion of the expert based on collective clinical observations of a class of victims. . . . The experts in each case are merely outlining probable responses to a traumatic event. It is clearly within the realm of all human experience to expect that a person would react to a traumatic event and that such reactions would not be consistent or predictable in all persons. Finally, there is a fundamental

[1] *People v Davis*, 343 Mich 348; 72 NW2d 269 (1955); *Frye v United States*, 293 F 1013 (DC Cir 1923), superseded by statute as stated in *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579, 587; 113 S Ct 2786; 125 L Ed 2d 469 (1993).

[2] *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993).

> difference between techniques and procedures based on chemical, biological, or other physical sciences as contrasted with theories and assumptions that are based on the behavioral sciences. [*Beckley*, *supra* at 721.]

Defendant argues that the trial court abandoned its gatekeeping role when it allowed Schumann to testify because the area of delayed disclosure is junk science, i.e., the source of Schumann's data was unreliable. Again, defendant's focus on delayed disclosure as a distinct field is misplaced and, thus, the premise of his argument is faulty. Schumann derived his opinions from the field of behavioral science and, more particularly, the subspecialty of child sexual abuse, both of which are recognized fields of practice. *Peterson*, *supra* at 362-363; *Beckley*, *supra* at 718. Defendant's evidence showing that there is disagreement regarding the ratio of sexually abused children who delay disclosure affects only the weight of Schumann's testimony, not its admissibility. It does not render the subspecialty unreliable. Moreover, the lack of definitive empirical data drawn from scientific studies is irrelevant. As the *Beckley* Court recognized, human behavior is not a subject matter that lends itself to the type of scientific testing performed in the hard sciences. *Beckley*, *supra* at 721. "The expert testimony offered is based at best on an inexact scientific foundation, and therefore the evidence is only admissible when a victim's behavior becomes an issue in the case." *Id*. at 722.

Defendant also argues that Schumann's testimony was not reliable because the prosecution failed to show that Schumann used a scientific methodology in reaching his conclusions. Schumann's opinions were based on his experience and knowledge of pertinent literature. Defendant asserts that personal observation is not scientific methodology. However, as the *Beckley* Court observed, the ultimate testimony regarding behavioral traits "is really only an opinion of the expert based on collective clinical observations of a class of victims." *Id*. at 721. More recently, the Supreme Court held that a psychiatrist's testimony complied with the current version of MRE 702 where, based on his experience treating alcoholics, he testified about the behaviors typical of an alcoholic. *Noecker*, *supra* at 11-12. Accordingly, the trial court did not abuse its discretion in deciding that Schumann's testimony met the standards in MRE 702.

Defendant also argues that Schumann impermissibly testified at trial that the victim in this case was, in fact, a victim of sexual abuse. Because defendant did not challenge this testimony at trial, our review is limited to plain error affecting defendant's substantial rights. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004). An expert may not testify that sexual abuse occurred or vouch for the veracity of an alleged victim. *Peterson*, *supra* at 352. However, "an expert may testify with regard to the consistencies between the behavior of the particular victim and other victims of child sexual abuse to rebut an attack on the victim's credibility." *Id*. at 352-353. We do not view Schumann's testimony as stating that the victim was indeed a victim of sexual abuse. Rather, Schumann interpreted the victim's behavior as consistent with that of a sexual abuse victim after defendant attacked her credibility. Therefore, defendant has not established plain error warranting reversal.

II. Prosecutor's Conduct

Defendant argues that the prosecutor committed misconduct by comparing him to Ted Bundy, a well-known serial killer, in her closing argument. Because defendant failed to challenge the prosecutor's argument at trial, we review this issue for plain error affecting defendant's substantial rights. *Knox*, *supra* at 508. Claims of prosecutorial misconduct are

decided on a case-by-case basis, and we must examine the record and evaluate a prosecutor's remarks in context. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). Viewed in context, the prosecutor did not compare defendant directly to Ted Bundy. She only made the point that people who commit heinous crimes do not look a particular way, i.e., guilt cannot be judged by physical appearance. A prosecutor need not limit her arguments to the blandest possible terms. *Dobek*, *supra* at 66. Accordingly, there was no plain error. In addition, defense counsel was not ineffective for failing to challenge the prosecutor's argument. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005) (counsel is not required to make a futile objection).

III. Jury Instructions

Defendant argues that the trial court erred by failing sua sponte to give a special unanimity instruction because his CSC II conviction could have been based on numerous different acts. Because defendant failed to request a special unanimity instruction, or challenge the trial court's failure to give such an instruction, this issue is unpreserved. Thus, our review is limited to plain error affecting defendant's substantial rights. *Knox*, *supra* at 508. "A defendant has the right to a unanimous verdict and it is the duty of the trial court to properly instruct the jury on this unanimity requirement." *People v Martin*, 271 Mich App 280, 338; 721 NW2d 815 (2006). In this case, the trial court gave a general unanimity instruction, which is usually sufficient. *Id.* But as further explained in *Martin*,

> the trial court must give a specific unanimity instruction where the state offers evidence of alternative acts allegedly committed by the defendant and "1) the alternative acts are materially distinct (where the acts themselves are conceptually distinct or where either party has offered materially distinct proofs regarding one of the alternatives), or 2) there is reason to believe the jurors might be confused or disagree about the factual basis of defendant's guilt." [*Id.*, quoting *People v Cooks*, 446 Mich 503, 524; 521 NW2d 275 (1994).]

CSC II involves sexual contact. MCL 750.520c. "'Sexual contact' includes the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts . . . ." MCL 750.520a(q). According to the victim's testimony, the acts corresponding to the CSC II counts occurred when defendant got into her bed during the early morning hours and rubbed her vagina under or over her underwear, or rubbed her buttocks. She testified regarding the details of the first incident and stated that similar incidents occurred more than ten times. However, these different acts were not materially distinct and defendant offered the same defense to all acts, i.e., that the victim was lying.

Defendant asserts that his conviction of only one count of CSC II indicates that there was juror confusion or disagreement. However, the question is whether there was reason to believe that jurors would be confused or disagree on the factual basis for the charges at the time the trial court instructed the jury. Here, there was no evidence of any variation from the specific facts pertaining to the acts other than when they occurred, and all the alleged acts were within the timeframe of the charged offenses. Therefore, the trial court had no reason to believe that there might be juror confusion or disagreement. Accordingly, the trial court did not plainly err in failing to give a special unanimity instruction. Further, because a request for such an instruction

would have been futile, defendant's corresponding ineffective assistance claim also fails. *Mack*, *supra* at 130.

IV. Student Safety Zone Restrictions

Defendant challenges the constitutionality of the student safety zone restrictions laid out in the Sex Offenders Registration Act, MCL 28.721 *et seq*. These restrictions provide that sex offenders shall not live or work within 1,000 feet of a school, with certain exceptions. MCL 28.733-MCL 28.735. Questions regarding justiciability are questions of law subject to de novo review. *Michigan Chiropractic Council v Comm'r of the Office of Financial & Ins Services*, 475 Mich 363, 369; 716 NW2d 561 (2006). "The doctrine of ripeness is closely related to the doctrine of standing, as both justiciability doctrines assess pending claims for the presence of an actual or imminent injury in fact." *Id*. at 378. Here, defendant has not alleged any injury in fact as a result of the student safety zone restrictions. Indeed, defendant is currently incarcerated. Therefore, defendant has no justiciable claim and this issue is not properly before us.

V. Correction of the Judgment of Sentence

Defendant argues, and plaintiff concedes, that the judgment of sentence inaccurately indicates that defendant was convicted of violating MCL 750.520c(1)(a) when he was actually convicted of violating MCL 750.520c(1)(b). Therefore, we remand for correction of this clerical error.

Affirmed and remanded for correction of defendant's judgment of sentence in accordance with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Peter D. O'Connell
/s/ Brian K. Zahra